DOCUMENT RESUME

ED 377 182 SP 035 622

AUTHOR Hazard, William R.
TITLE Legal Aspects of Teacher Evaluation.
PUB DATE 21 Nov 93
NOTE 12p.; Paper presented at the Annual Convention of the National Organization on Legal Problems in Education (39th, Philadelphia, PA, November 19-21, 1993).
PUB TYPE Speeches/Conference Papers (150) -- Information Analyses (070)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Collective Bargaining; Elementary Secondary Education; Evaluation Criteria; *Formative Evaluation; *Labor Legislation; *Legal Problems; Legal Responsibility; *Public School Teachers; State Legislation; *Summative Evaluation; *Teacher Evaluation; Teaching Experience; Tenured Faculty; Unions
IDENTIFIERS Illinois; *Reform Efforts

ABSTRACT

The performance evaluation of tenured teachers in the public schools raises significant legal issues particularly in the context of recent education reform efforts. Collective bargaining has expanded to become a central part of labor relations in public schools and has served often to neutralize threatening evaluations. As reform efforts demand more and tougher performance evaluation, teachers and unions will mount more vigorous defense and press for the right to bargain the criteria, ratings and other key evaluation pieces. Consequently, legal issues will continue to expand into teacher evaluation. In all evaluation the burden of proof rests with the district which must design clear, unambiguous criteria. All states have some tenure or continuing contract laws which also provide for notice and a hearing before dismissal of tenured teachers. Often a teacher may seek to eliminate a negative evaluation by invalidating the evaluation process as unfair on some grounds. When an evaluator rates a teacher "unsatisfactory" the evaluation clearly becomes summative and the evaluator must be careful to preserve the integrity of the data and good faith in the process at all costs. (Contains 20 references.) (JB)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED 377 182

Legal Aspects of Teacher Evaluation

Presented at
The 39th Annual Convention
National Organization on Legal Problems in Education

November 19–21, 1993
Wyndham Franklin Plaza Hotel
Philadelphia, Pennsylvania

PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

W R Hazard

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☐ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

William R. Hazard, J.D., Ph.D.
Attorney at Law
Professor of Education & Social Policy
Northwestern University
Evanston, Illinois

SP035622

BEST COPY AVAILABLE

Legal Aspects of Teacher Evaluation

William R. Hazard. J.D.. Ph.D.

The school reform movement of the 1980s brought with it a renewed interest in evaluating the performance of teachers and administrators in the public school. Starting with "A Nation at Risk" in 1983[1] performance evaluation of teachers. although not new to the profession. nonetheless has raised substantial legal issues in a new context. This paper examines some of the legal issues raised in the evaluation of tenured teachers in the public schools.

It seems useful at the outset to distinguish two kinds of evaluation frequently employed in teacher evaluation. Formative evaluation. as used here. means the efforts to improve the teacher's performance through a variety of in-service. staff development activities clearly intended to help the teacher perform more effectively in the role of teacher. Formative evaluation generally is collaborative. non-threatening. and elicits a high degree of collegial. helping. even nurturing. behaviors. The up-front purpose of formative evaluation is to help the teacher improve teaching skills through cooperative. collaborative efforts. The evaluator does not threaten the evaluatee in any way. Indeed. the evaluator's stance is clearly and avowedly helpful and beneficent toward the evaluatee.

The other kind or purpose of evaluation is to gather performance data on which the evaluator may base in important judgement about the teacher. This evaluation probably isn't collaborative or collegial. The teacher under this evaluation process may recognize that the data gathered by the evaluator may lead to a result detrimental to the teacher's interest. This mode is summative evaluation and it does not necessarily lead to improved performance. In summative evaluation. the evaluator seeks to gather accurate data which can fairly lead to a performance judgement which may affect the life of the teacher. Summative evaluations serve many possible purposes—a decision to hire. to promote. to place on the salary

---

Dr. Hazard. a practicing attorney, is Professor at the School of Education and Social Policy. Northwestern University, Evanston. Illinois.

schedule, to "freeze" the teacher's salary or to impose some sanction on the teacher, or, in the extreme case, to seek to dismiss or "fire" the tenured teacher. Summative evaluations can be threatening to the teacher's self-interest and can lead to unpleasant conclusions. For these reasons, the teacher may not cooperate with the evaluator. In fact, under summative evaluations, the teacher may work hard to mask negative data about performance and may take elaborate steps to hide aspects of performance which may not benefit the teacher. Whatever trust and cooperation that may exist between the teacher and the evaluator is threatened by the summative evaluation and, indeed, may evaporate during the summative process.

Formative evaluation usually involves conferences, discussions, training activities, self-assessments, and the usual range of staff development, in-service training activities. These activities may be custom-designed for the specific teacher or may be made available for groups of teachers with similar interests or similar development needs. Summative evaluation is person-specific, highly individualized, and usually involves the evaluator's gathering performance data either directly through classroom observation or indirectly through examination of the artifacts or outcomes of teaching. Summative evaluation usually calls for a formal relationship between the evaluator and the teacher. Most state evaluation plans require some kind of training for the evaluators. Summative evaluators, usually school administrators, credentialled by the state, are trained in observation and analysis skills, and have more or less training in recording and interpreting teacher performance data.

Summative performance evaluations include, necessarily, some reference to criteria and standards. The criteria and standards frequently are included in the statutes mandating evaluation. Illinois, for example, mandates public school district evaluation plans to include at least five "components" (read: criteria): (1) the teacher's attendance, (2) planning, (3) instructional methods, (4) classroom management (where relevant), and (5) competency in the subject matter taught.[2] The Illinois Statute also names (but does not define) the rating standards against which the summative data are measured: Excellent, Satisfactory, and Unsatisfactory.[3] Under Illinois law, each of the 930± public school districts name and define the standards to their own satisfaction. Informed data suggest that a few districts expand the mandated standards to include "superior" or something similar at the top of the performance scale and some districts add a rating between their unsatisfactory and satisfactory ratings, such as "marginal" or "needs improvement." For reasons not clear to this author, school districts quite often extend the range and sweep of performance criteria

beyond the boundaries expressed in the statutes. In Illinois, districts frequently add criteria on the teachers' professional relations, personal work styles, and related areas. These plans, developed cooperatively with the teachers, sometimes resemble performance wish lists with almost minute behaviors elevated to criterion status.

Broad legal issues emerge quickly as one surveys the intersection of law and teacher evaluation.

Since the early 1960s, collective bargaining has expanded to become a central part of labor relations in the public schools of most states. Rynecki and Lindquist examined teacher evaluation and collective bargaining from the management perspective.[4] They reported substantial variations in the state legislation dealing with the issue of to what extent teacher evaluation substance and procedures are bargained. This issue carries heavy freight to the bargaining table and to the teacher evaluation process. If I perceive the performance evaluation process to be threatening to my best interests, you can be sure that I would try to bargain away the threat or, stated more simply, I would try to pull the evaluation's teeth before they bit me. The statutory grounds for the discipline and dismissal of teachers provide useful clues as to the agenda pursued through collective bargaining to neutralize threatening evaluations. Delon's research is an early summary of the state laws concerning teacher dismissal and discipline.[5] Over the past few decades, collective bargaining gradually expanded to take on various roles in the evaluation process. "Wages, hours, and conditions of employment," the scope of private sector bargaining borrowed from the National Labor Relations Act,[6] has been picked up in state statutes. Many of these same state statutes recognize management "prerogatives" as a limiting concept. Wisconsin case law, for example, recognized a bounded right of teachers to participate in shaping the evaluation process.[7] At the other end of the spectrum, Louisiana has no mandatory bargaining concerning teacher evaluation.[8] Somewhere between these extremes, Illinois permits bargaining as to the procedures of teachers evaluation but not the substance of the criteria, ratings, or ultimate evaluative judgment.[9] One can safely predict that teacher unions will continue to press for the right to bargain the criteria, ratings, and other key pieces of the evaluation. Rynecki and Lindquist predict that the unions will successfully bargain evaluation procedures but will make few gains in bargaining evaluation criteria. They see, then, that "...the trend for the future for management regarding bargaining teacher evaluation clauses in its contracts is that management must now more completely know what it needs and wants, and know how to successfully bargain for it."[10] It seems clear

that the law will move further into the teacher evaluation process as bargaining becomes more sophisticated and the stakes of evaluation escalate.

Zerger examined similar concerns from the union perspective and, not surprising, reached somewhat different conclusions.[11] This piece examined the problems of reliability and validity in the evaluation data gathering process and concluded that

> The negotiation of strong evaluation provisions in teacher collective bargaining agreements is becoming increasingly important because of the central role held by teacher evaluation in many of the current education reform innovations. ... With collectively bargained procedures that are valid, reliable, and effective, evaluation can truly become 'a powerful strategy for achieving school improvement goals.'[12]

A second area of concern deals with the legal sufficiency of criteria, processes, and procedures in the evaluation process. Beckham addressed these concerns and made a persuasive case for clarity of job-relatedness, and fairness of the criteria as key attributes in legally sound evaluation plans.[13] The Illinois statute assumes that the five statutory criteria in the mandated plans (teacher attendance, planning, instructional methods, classroom management, and subject matter competency) meet the job-relatedness test. The job-relatedness stems from an earlier case wherein the U.S. Supreme Court struck down some employment criteria which, in the court's mind, bore inadequate relationship to the job demands.[14] Most state statutes on teacher evaluation give considerable latitude to the school districts to define and describe their evaluative criteria. Within reason, the local school districts may select performance criteria that reflect the educational values of the community served. Many districts make some effort to base criteria on "research." Research evidence to support specific teacher performance criteria or expectations is at once obvious and elusive. Most informed observers would agree that well planned lessons are an important element in effective teaching. As to what constitutes "well-planned lessons" is subject to considerable debate. The use of paper and pencil tests as criteria for selection and dismissal of teachers gets mixed reviews. Unless such tests are clearly related to the job demands and do not have a disparate impact on protected classes of employees, they are highly suspect as criteria and probably should not be used in teacher evaluation.

In all teacher evaluation processes, the burden of proof rests on the district. It must prove, by credible evidence, that the tenured teacher's presumption of competence must fall in the face of evidence that is relevant, credible, and substantial.[15] School districts cannot discriminate on the basis of race, religion, national origin, sex, age, or handicap.[16] Teacher

evaluations which result in negative consequences are subject to interpretation by the teacher and by the courts as based on some discriminatory and prohibited base. It behooves the district to use evaluative procedures that clearly establish the factual base on which the evaluative judgement rests. This caution simply protects the district against the possible charge that the evaluation process is a subterfuge for prohibited discrimination. By establishing clear, reasonable, and relevant criteria and then documenting the evaluative findings which lead to the negative conclusion, the district reduces its exposure to legal challenges and possible failure of the evaluation process. As Beckham noted,

> Development and implementation of summative evaluation standards and practices will not eliminate legal disputes, but should yield a documentary record which substantiates the fairness and reasonableness of the process, establishes the proper predicate for an adverse employment decision, and elaborates the procedural integrity of the process.[17]

It behooves the local school district to design clear, unambiguous performance criteria. Such criteria must be capable of assessment and documentation. The evaluator and the teacher must be able to recognize when and how well the criteria are met and a documented trail of performance evidence must be developed by the evaluator to support the evaluation rating.

In addition to the legal issues surrounding collective bargaining and the evaluation process and those arising from the legal sufficiency of criteria, ratings, and procedures, there is yet another arena—the legal consequences of negative evaluation. The evaluations discussed here concern tenured teachers. Tenured teachers are those who, after a successful probationary status, have earned a permanent, continuing contract employment relation. Tenured teachers can be dismissed for specific causes, usually identified in the state laws, and within the structured procedures designed by statute to protect the teacher against arbitrary and capricious dismissal. A recent survey of state tenure laws reveals that as of April, 1993, each of the 50 states and the District of Columbia have enacted some form of tenure or continuing contract laws.[18] Forty-three states have state-wide tenure provisions, applicable to all districts in the state and seven states provide for some variations, usually based on the size of the school district. One state provides for teacher tenure only in those counties with population in excess of 500,000. As noted earlier, summative evaluations gather performance data which may lead to negative decisions, including dismissal. At some point in the evaluation process, the evaluation data can be used to support decisions which can threaten the rights acquired by the tenure status. When property interests (the

right to enjoy a "good reputation" as a teacher) are threatened by a dismissal action based on evaluative data, the teacher may seek whatever legal protections may be available. The state tenure laws provide for notice and a hearing prior to the dismissal of tenured teachers. The intent of such provisions is to insure that appropriate process is followed to protect the liberty and property interests of the tenured teacher.

Under Illinois law, for example, an unsatisfactory rating on the teacher's summative evaluation leads to a remediation process. At the end of the remediation time-frame, the failure to remediate the specified performance deficiencies at a rating of "satisfactory" or better, leads to the teacher's dismissal under the provisions of the relevant statute.[19] In this context, the legal issues surrounding teacher evaluation heat up considerably.

The Illinois statute (Art. 24A, Illinois School Code) contemplates teacher evaluations at least biennially and that the evaluations result in remedial action being taken when deemed necessary.[20] When the rating of "unsatisfactory" is given, the tenured teacher is entitled to a one-year remediation opportunity. At this point, the teacher may grieve the rating under applicable provisions of the negotiated contract. If the grievance process is not satisfactory the teacher may file a claim with the appropriate labor board and seek a ruling from such board. Not infrequently the teacher alleges that some part of the evaluation process amounts to an unfair labor practice or charges the evaluator with some sort of impermissible motive or procedure. It clearly is in the teacher's interest to destroy the negative rating before it can cause mischief to the employment relation. In such grievance or Labor Board procedures, the teacher seeks to invalidate the evaluation process and thus "kill" the negative result. The school district, likewise, tries to protect the rating process and outcome as a valid, authentic tool to implement the evaluation plan. Through the grievance machinery and the Labor Board hearing, the teacher will try to challenge the school district's evaluative evidence before the matter gets to a dismissal hearing under the applicable statutes.

Some implications of these issues seem reasonably clear. The legal dimensions of teacher evaluation emerge before, during, and after the evaluation process. The relevance, clarity, and reasonableness of the evaluation criteria must support their application to the teacher's performance. Teachers likely will become increasingly concerned that the criteria for their performance evaluation be fair, be closely related to the teaching performance expected of them, and that the criteria be reasonable in light of the context in which the teachers work. Effective teaching behaviors will continue to be the measure of performance but it is not reasonable to ignore the school environment in which the teaching takes place. The current

impact of drugs, alcohol, and physical violence in many urban and suburban schools will demand increased attention in the evaluation process.

The schooling culture expects the building principal to serve as the primary evaluator in both formative and summative settings. The principal, by role definition, is expected to take serious responsibility for the in-service, staff development needs of the individual teacher and the professional staff as a whole. At the same time, the evaluation process calls for the principal to do the summative evaluations of these same staff members. The two evaluation purposes are incompatible. The mutual trust, open communication, and collegial relations needed in the formative evaluation relationship are seriously jeopardized by the critical, judgmental role required of the evaluator in the summative evaluation setting. The teacher under summative evaluation isn't likely to remain open and vulnerable to the evaluator when potentially hurtful decisions may flow from the performance data. Given those stakes in the evaluation process, the teacher may not be as open, trusting, and forthright when the evaluation purpose is summative or ambiguous. It seems likely that mutual trust and confidence between the teacher and the principal will be the first casualty in the summative evaluation process.

We should expect the legal issues to multiply and intensify as performance evaluation expands and becomes more common in the schools. The pressures from school reform to evaluate teacher and administrator performance likewise will intensify and the summative evaluations will stimulate tougher defenses from the teachers and the unions. The likelihood of widespread cooperative participation by teachers and teacher unions in the summative evaluation process is not great. If the teachers perceive that their participation in the process as consulting teachers, mentor teachers, or similar role is evaluative of their colleagues' performance, we should expect their increased reluctance to play the game. The opportunity to participate in "reform" activities will attract some teachers. The parallel perception, however, of their role as a "tool of management" and the possible charge of "betrayal of their colleague teachers" likely will dampen their enthusiasm for taking any part in the evaluation process.

There is yet another implication that may cause serious ethical and professional concerns to many educators. Following the rating of the teacher's performance as "unsatisfactory", the evaluator moves clearly into a summative mode. The formative evaluation role will be undertaken by the consulting teacher (in Illinois) or by some mentoring, assisting colleague. The evaluator will gather performance data through classroom observation and

other means. At the same time, the school district counsel may enter the process to monitor and advise the district (and the evaluator) about the evidentiary needs should a dismissal hearing be necessary later. The evaluator must be quite careful not to allow the evidentiary needs of the legal counsel to control the performance assessment data gathered during the summative evaluation. Obviously, the evaluator must cooperate with and respect the needs of counsel. Equally obviously, the authenticity and the integrity of the data gathered during the summative evaluation period must be preserved and maintained at all costs. If the performance evaluation process is to be a useful force for instructional improvement, the integrity and good faith of the evaluator and the data-gathering process must be preserved. Any hint that the data are manufactured, skewed, or nudged toward a predetermined end simply cannot be tolerated.

This paper has examined but a few of the legal issues surrounding teacher evaluation. As time goes by and the evaluation process becomes more embedded in the culture of schools, we should expect clearer answers to the legal questions raised in the performance evaluation process. Through litigation and the normal process of accumulated legal decisions, we should be better informed about the evaluation process and the legal constraints involved.

Notes

1. National Commission on Excellence in Education. "A Nation at Risk: The Imperative for Educational Reform. (1983)

2. Illinois Revised Statutes. Chapter 122, Sec. 24A–5(b).

3. *Ibid.* Sec. 24A–5(c).

4. Steven B. Rynecki and John H. Lindquist. "Teacher Evaluation and Collective Bargaining. A Management Perspective." *Journal of Law and Education.* Vol. 17, No. 3. Summer. 1988. pp. 485-506.

5. Floyd G. Delon. *Substantive Legal Aspects of Teacher Discipline.* NOLPE: Topeka. KS. 1972. 55 pp.

6. 29 U.S. Code. Sec. 158(d). (1976).

7. See *Beloit Educ. Ass'n.* v. *WERC.* 73 Wis 2d 43. 242 N.W. 2d 231 (1976).

8. See *Louisiana Teachers' Ass'n.* v. *Orleans Parish School Bd.* 303 SO 2d 564 (1974).

9. *LeRoy C.U.S.D. 2* v. *IELRB* and *Central City Ed. Assoc.* v. *IELRB.* 149 Ill. 2d 496, 599 N.E:'. 2d 892 (1992).

10. Rynecki and Lindquist. p. 495.

11. Kirsten L. Zerger. "Teacher Evaluation and Collective Bargaining. A Union Perspective." *Journal of Law and Education.* Vol. 17. No. 3. Summer. 1988. pp. 507-525.

12. *Ibid.*, p. 525.

13. Joseph Beckham. "Legally Sound Criteria. Processes and Procedures for the Evaluation of Public School Professional Employees." *Journal of Law and Education.* Vol. 14. No. 4. October 1985. pp. 529-551.

14. *Griggs* v. *Duke Power Co.* 401 U.S. 424 (1971).

15. Beckham. *op. cit.*, p. 535.

16. 42 U.S.C. §200 (e) (1976) (Title VII of the 1964 Civil Rights Act);
20 U.S.C. §1681 (1976) (Title IX of the Education Amendments of 1972);

BEST COPY AVAILABLE

29 U.S.C. §794 (1976) Section 504 of the Vocational Rehabilitation Act of 1973) and Americans with Disabilities Act of 1990. 424 U.S.C. Title 2. Secs. 1231ff (1990).

17. Beckham. *op. cit.*, p. 551.

18. Hazard. William R. and John Remy. "Tenure Laws in Theory and Practice." (unpublished ms.) April 1993.

19. For causes of dismissal of tenured teachers. see Illinois Revised Statutes. Ch. 122. Sec. 10-22.4. The dismissal procedures can be found in Illinois Revised Statutes. Sec. 24-12.

20. Illinois Revised Statutes. Chapter 122. Sec. 24A–1. The language here may be instructive. "The purpose of this article is to improve the educational services of the elementary and secondary public schools of Illinois by requiring that all certified school district employees be evaluated on a periodic basis and that the evaluations result in remedial action being taken when deemed necessary."